No. 02-1546

In The

Supreme Court of the United States

RUBICON INC. AND LEONARD B. SANFORD,

Petitioners,

versus

JOSEPH E. WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana For The First Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent correctly identifies the relief Petitioners are seeking, but incorrectly implies that Petitioners have already received it. Rubicon Inc. and Leonard Sanford do contend that the Louisiana appellate court "should have remanded to consider whether plaintiff's condition qualified for FMLA leave."[1] However, contrary to Respondent's suggestion, Petitioners are not suggesting that they were prevented from litigating this issue, but only that it was never decided. The trial court made extensive findings of fact, but no finding declared that Respondent's physical condition qualified him for FMLA leave.[2] Nor did the Court of Appeal make any such finding in reversing the trial court's decision.[3] It was Respondent's burden to prove that he qualified for FMLA leave,[4] and he never carried it.[5]

Instead, the Court of Appeal ruled that Rubicon committed a substantive violation of the FMLA by failing

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[1] Respondent's Opposition at p. 1.

[2] Pet. App. 16-18.

[3] *Williams v. Rubicon, Inc.*, 1998-1743 (La. App. 1st Cir. Sept. 24, 1999), 754 So.2d 1081 (Pet. App. 1).

[4] *See, e.g.*, *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973 (5th Cir. 1998).

[5] Respondent contends at pp. 2 and 6 of his Opposition that Rubicon conceded he could not have returned to work, even for light duty. To the contrary, Rubicon's witnesses did no more than admit that Respondent's doctor had not cleared him for light duty because Respondent never asked to be cleared for light duty. Petitioners conceded nothing about Respondent's actual physical condition, and Respondent proved nothing. That, as well as the Louisiana appellate court's decision that failure to obtain a second medical opinion is a substantive violation of the FMLA, is why the case should be retried.

to seek a second opinion under the statute, regardless of Respondent's physical condition. In other words, Rubicon's failure to obtain a second opinion excused Respondent from the necessity of proving that his physical condition warranted FMLA leave. Thus, Respondent is absolutely wrong when he declares, "This case does not raise the issue urged by Petitioners in their writ application."[6] The issue presented to this Court by Petitioners is the following:

> Whether 29 U.S.C. § 2613(c)(1) of the Family and Medical Leave Act ("FMLA"), which provides that "the employer may require . . . that the eligible employee obtain the opinion of a second health care provider," is mandatory, as held by the Court below and several United States District Courts, or is merely permissive, as indicated by its plain language and as held by the United States Circuit Courts of Appeals for the Fourth and Eighth Circuits.[7]

In fact, as the Louisiana appellate court's decision plainly indicates, the question presented by Petitioners is the exact question ***Respondent*** placed before that court when it ruled on liability in this case. In the opinion from which Petitioners seek review, the Louisiana appellate court quoted from Respondent's brief, stating:

> Mr. Williams continues, noting that "*Rubicon violated the FMLA by failing to seek*, when it had the occasion to doubt whether [Mr.] Williams was

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[6] Respondent's Opposition at p. 3.

[7] Petition for Certiorari at p. (i).

> truly unfit to work, *the medical certification explicitly required in such a situation.*

(emphasis added).[8]

Respondent's contention that the failure to seek a second opinion under the FMLA is a substantive violation of the FMLA in and of itself was rejected by the federal circuit courts in *Stekloff v. St. John's Mercy Health Systems,* 218 F.3d 858 (8th Cir. 2000) and *Rhoads v. FDIC,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002), and should now be rejected by this Court.

Prompted by the invitation from Respondent and emboldened by the California District Court's decision in *Sims v. Alameda-Contra Costa Transit District*, 2 F.Supp.2d 1253 (N.D. Cal. 1998), the Louisiana appellate court adopted the position advocated by Respondent and *Sims* and held that Petitioners violated Respondent's substantive rights under the FMLA by failing to follow the FMLA's procedures for obtaining a second medical opinion:

> After a review of the record in this case, it is clear that Rubicon did not honor Mr. Williams' substantive rights pursuant to the FMLA. *Rubicon failed to follow the procedures set forth in the FMLA for obtaining the required medical certification* regarding the 'serious health condition' that prevented Mr. Williams from performing the functions of his job.

(emphasis added).[9]

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[8] *Williams v. Rubicon, Inc.*, 1998-1743 (La. App. 1st Cir. Sept. 24, 1999), 754 So.2d 1081 (Pet. App. 8-9).

[9] *Id.* (Pet. App. 9).

Based on the preceding excerpt, there can be no doubt that the Louisiana appellate court's decision was grounded in its belief that the second opinion procedures set forth in the FMLA were mandatory and thus Petitioners' failure to follow those procedures was a substantive violation of the FMLA. Thus, it is clear that the question presented to this Court by Petitioners is exactly the question that was decided by the Louisiana Court of Appeal.

Turning to that question, the law is clear in the federal circuit courts that the second opinion procedures set forth in the FMLA are permissive, not mandatory; therefore failure to obtain a second medical opinion cannot serve as the basis for a substantive violation of the FMLA.[10] As a result of the Louisiana appellate court's decision in this case, the law in Louisiana is different.

Louisiana state courts are not bound by the federal circuit courts, only the rulings from this Court.[11] Thus, absent this Court's reversal of the Louisiana appellate court's decision in this case, an employer in Louisiana will be subject to a different (and erroneous) standard under the FMLA simply because of geographic happenstance. Armed with the Louisiana appellate court's decision in this case, an employee alleging a violation of the FMLA can walk into a Louisiana state court and obtain damages simply because the employer declined to exercise his

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[10] *See Stekloff,* 218 F.3d 858 (8th Cir. 2000) and *Rhoads,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002).

[11] *See State v. Sanders,* 93-0001 (La.11/30/94); 648 So.2d 1272, *cert. denied,* 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996) (in matters involving federal law, state courts are bound only by decisions of the United States Supreme Court).

optional right to seek a second medical opinion. As explained fully in the Petition for Certiorari, it is this kind of conflict and potential uneven application of federal law that clamors for this Court's review. The question presented to this Court is an issue of law. This Court should not fall prey to Respondent's tactic in attempting to divert attention away from this important legal issue by characterizing this dispute as one of fact or credibility.

Notably absent from Respondent's Opposition is any substantive discussion of *Sims*, *Rhoads* and *Stekloff*. Such an omission is telling. Respondent's efforts to mire this Court into a discussion of irrelevant facts and testimony is a product of Respondent's inability to contest the legal issue before this Court. The federal circuit courts' decisions in *Rhoads* and *Stekloff* are clear and resoundingly repudiate the holding by the Louisiana appellate court. As explained in *Rhoads*:

> We agree with the Eighth Circuit's assessment in *Stekloff*. . . . The FMLA provides only that an employer "may" seek a second, or third, opinion. . . . Because the term "may" is permissive, the plain language of the statute indicates that an employer who questions the validity of a certification has the option of seeking a second or third opinion, without being required to do so.[12]

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[12] *Rhoads*, 257 F.3d at 385-86.

CONCLUSION

Because an employer "may" seek a second or third opinion under the FMLA, the decision not to seek that opinion cannot be a substantive violation of the statute. The Louisiana appellate court's decision to the contrary is clearly wrong. Petitioners respectfully request that this Court grant its Petition for Certiorari and resolve the conflict between the Louisiana appellate court's decision and the federal circuit court decisions in *Stekloff v. St. John's Mercy Health Systems,* 218 F.3d 858 (8th Cir. 2000), and *Rhoads v. FDIC,* 257 F.3d 373 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002).

Respectfully submitted,

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